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No. 273

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NEW JERSEY CHAPTER, AMERICAN INSTITUTE OF PLANNERS, ETC., ET AL., *Appellants*

v.

NEW JERSEY STATE BOARD OF PROFESSIONAL PLANNERS, ET AL., *Appellees*

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

APPELLANTS' BRIEF IN OPPOSITION TO MOTIONS TO DISMISS

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In response to the Jurisdictional Statement, two motions to dismiss have now been filed, both contending that this case does not involve a substantial Federal question. The gist of both motions is that the New Jersey Professional Planners Licensing Act is not irra-

tional on its face, that the statute must therefore be presumed to be consistent with the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and that that is the end of the matter.

Both motions, however, suffer from a common defect—namely, that they totally fail to take into account the fact that in the state courts below there was a full trial on the merits at which a long line of witnesses testified, many documents were offered and received, and the trial judge made extensive findings of fact. Neither of the two motions makes any mention of the trial, the evidence, or the findings based upon that evidence. They discuss one technical (and immaterial) error made by the trial court,[1] and they engage in extensive speculation (without record support) as to what the New Jersey Legislature may have had in mind in writing the statute, but neither motion comes to grips with, or even mentions, the facts established at trial.

The result is that the two motions have simply missed the basic point involved in this appeal. The fundamental position taken in both motions is that the classifications made by the statute as among the various professions must be presumed to be factually rational "unless facts judicially known or proved preclude

[1] The motion filed by the Attorney General of New Jersey makes much of the fact that the trial judge referred in passing to a "statement annexed to the bill" which ultimately became law. Apparently the statement involved, which was not offered in evidence or discussed at the trial, was in fact not annexed to the bill in question. This single factual error, however, does not affect the overall findings of fact. Those findings were based upon hundreds of pages of testimony and voluminous documentary materials, the bulk of which are summarized in the trial court's extensive analysis of the evidence. See Jurisdictional Statement, pp. 4a-11a.

that possibility"[1] and that in the courts below appellants had "the burden of showing that [the statutory classification] does not rest upon any reasonable basis but is essentially arbitrary."[2] All of this is true—but one of the basic reasons why appellants seek review by this Court is precisely that in this case appellants *did* prove, and conclusively so, that the statutory classification is irrational and arbitrary. In this respect, therefore, the two motions entirely miss the point at issue.

To put the matter in concrete terms, although the New Jersey Legislature clearly recognized the distinction between the skills of the professional planner and the skills of engineers, architects, and land surveyors,[3] it nevertheless treated licensed engineers, architects, and land surveyors as though, by reason of such licenses, they *ipso facto* possess the requisite skills to engage in professional planning. Perhaps such legislative treatment is not irrational on its face, and if there had been no trial in the state courts below, perhaps these statutory classifications could be presumed to be rational so as to survive constitutional attack. But a full trial was held in the state courts below, and appellants proved (in the trial court's phrase) by "overwhelming" evidence that licensed engineers,

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[1] Motion of Respondents Goodkind and Purcell, p. 9, quoting Clark v. Paul Gray, 306 U.S. 583, 594 (1939).

[2] Motion of the Attorney General of New Jersey, p. 14, quoting Morey v. Doud, 354 U.S. 457, 464 (1957).

[3] The contrary position of the Attorney General of New Jersey notwithstanding, the legislative recognition of the distinct and separate character of the planning profession, as compared with the three "preferred" professions, is clearly reflected in several sections of the New Jersey licensing statutes. See Jurisdictional Statement, pp. 11-13, 17-18, 27-28.

architects and land surveyors do not *ipso facto* have any competence in the planning field.[1] In short, whatever might be one's impression in the absence of proof, the evidence shows that the classification made by the Legislature is without rational basis and hence necessarily involves an invidious and unconstitutional discrimination.

Once the foregoing state of the record is recognized, it becomes apparent that many of the moving parties' comments upon the statutory scheme are matters of purely personal opinion and completely beside the point. For example, one of the motions emphasizes that the New Jersey Legislature drew distinctions between the various "licensed professions", granting automatic planners licenses to licensed members of the engineering, architectural, and land surveying professions, but denying such preferred treatment to such licensed professions as "[v]eterinarians, accountants, [and] librarians"—with the alleged purpose and effect (which are said to appear on the face of the statute without reference to the record) of excluding from the planning profession "those who might endanger it".[2] Having conjured up this legislative intent, the moving parties then express their personal view that this legislative scheme is rational and hence so clearly constitutional as to raise no substantial Federal question.

All of these observations are premised, however, not upon *fact*, but upon the moving parties' personal impressions as to the legislative thinking and as to the relationships between the skills of engineers, architects, land surveyors, veterinarians, accountants, librarians,

[1] Jurisdictional Statement, p. 15a.

[2] Motion of Respondents Goodkind and Purcell, pp. 6, 8-9.

professional planners, etc. Thus it is apparently the moving parties' impression that there is less "danger" in allowing licensed land surveyors generally to prepare master plans than in allowing licensed accountants to do so. Of course there is absolutely nothing in the record, and probably little if anything in ordinary human experience, to support any such speculative comparison. On the other hand, for present purposes it really doesn't matter, because the record is very clear as to the qualifications of land surveyors generally in the city planning field: the evidence is "overwhelming" that a land surveyor's license does not by itself reflect any degree of competence in the preparation of master plans (see, *e.g.*, R. 75a-76a, 305a, 381a, 453a). And yet under the challenged statutory scheme, it will be recalled, a so-called land surveyor who has never been to school, and who has never taken any examination in *any* subject, but who has spent some time sighting through a transit on construction jobs, may obtain a land surveyor's license and therefore an automatic license as a professional city planner[1]—while a professional city planner with a Ph.D. in city planning and many years of professional city planning experience

[1] See Jurisdictional Statement, pp. 20, 29-30. The fact that persons can become members of the three preferred classes (licensed engineers, architects, and land surveyors) without having taken any professional examinations lays to rest the argument advanced in the motion of the Attorney General of New Jersey (at pp. 24-25) to the effect that the statute is rational because all members of the preferred classes have demonstrated their professional competence through "qualifying examinations taken for licensure in each of these disciplines". Even if the taking of an examination in (for example) land surveying could be regarded as a rational basis for licensure as a professional city planner, it is in any event *not* true that all members of the preferred classes have necessarily taken professional examinations in their own particular fields.

is denied the same privilege. If that discrimination does not constitute, on its face, a clear denial of the equal protection of the laws, as appellants submit, nevertheless it surely raises a sufficiently substantial question to call for a plenary hearing in this Court.

CONCLUSION

In essence the record in this case shows that a State Legislature has given automatic professional licensing privileges to a class of persons who, according to the "overwhelming" evidence, do not generally possess any professional competence in the particular field involved, while at the same time denying the same privileges to persons who do possess professional competence in the field. Such an invidious discrimination clearly raises a substantial question of Federal constitutionality under the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

Respectfully submitted,

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No. 273. Decided October 9, 1967.

PER CURIAM.

The motions to dismiss are granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.